United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

958

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For the
District of Columbia Circuit
FILED
JAN 20 1958
Joseph W. Stewart
CLERK

No. 14,155
No. 14,236

JET BROADCASTING COMPANY, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WKST, INC.,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
Intervenors.

APPEALS FROM THE FEDERAL COMMUNICATIONS COMMISSION

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Robert L. Thiel, Printer
Washington, D. C.
EX 3-0625

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JOINT APPENDIX

207 EXCERPTS FROM OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

AT

WASHINGTON, D. C.
[May 20, 1957]

In Re application of:	)	
WKST, Inc. (WKST-TV) New Castle, Pennsylvania	)	Docket No. 11998 File No. BPCT-2234
Construction permit to change facilities	)	

ORAL ARGUMENT

* * * *

209 The above-entitled matter came on for oral argument before the Commission at 10:05 o'clock A. M., in Room 7134, New Post Office Building, Hon. GEORGE C. McCONNAUGHEY, Chairman of the Commission, presiding.

* * * *

213 ARGUMENT ON BEHALF OF COMMUNITY TELECASTING COMPANY

* * * *

214 Commissioner Doerfer: When did Channel 73, when was it granted a permit, or rather the WXTV community?

Mr. Shipley: Yes, sir. It was granted its permit about two years, 21 months earlier than this matter came up; as I recall, it was in 1953, also, I believe, in the latter part. I'm just speaking from memory without putting my --

215 Commissioner Doerfer: Is it on the air?

Mr. Shipley: No, sir, it is not on the air. It was involved in several -- well, here's the problem it ran into. It got 73 in Youngstown. There were two existing lower UHF channels which were network

affiliated with CBS and NBC, and after WXTV got its permit, it became apparent -- and this Commission has found the situation exists and can notice this factual matter -- that it was not possible for it to compete favorably with the two network stations on the lower channels; because of problems of coverage, national advertisers and networks refused to affiliate with it on that high channel.

So we applied to the Commission -- we made several attempts to get a lower channel. We tried to work out different systems of allocation that would put Channel 33 into Youngstown, and we applied first for a rule-making proceeding to get that result. The Commission wasn't favorable to it, but in that rule-making proceeding it did change New Castle to a hyphenated community with Youngstown and reassigned Channel 45.

* * * *

255 MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde concurring in the result except insofar as it relies on the decision in the Southeastern Enterprises case, Docket No. 11411; Commissioner Bartley concurring in part and dissenting in part and issuing a statement; Commissioners Lee and Ford not participating.

1. The Commission has before it for consideration a pleading entitled "Protest and Petition for Reconsideration" filed pursuant to Sections 309(c) and 405 of the Communications Act of 1934, as amended, by Community Telecasting Company, on March 21, 1957; an "Opposition to Protest and Petitions for Reconsideration" filed by WKST, Inc. on March 28, 1957; the Commission's Memorandum Opinion and Order (FCC 57-372) released April 23, 1957; the transcript of oral argument on the protest heard by the Commission on May 20, 1957 with respect to certain issues urged by Community; and Protestant's Brief filed by Community on May 20, 1957, in connection with the oral argument.

2. By its said pleading of March 21, 1957 Community Telecasting Company protested pursuant to the provisions of Section 309(c) of the Communications Act of 1934, as amended, and requested reconsideration

pursuant to Section 405 of the Act, of the Commission's action of February 20, 1957 granting the application of WKST, Inc. (File No. BPCT-2234). By this action WKST was authorized to change its transmitter and antenna site from near New Castle, Pennsylvania to a site on Midlothian Boulevard in Youngstown, Ohio, and to increase antenna height and effective radiated power. By its Memorandum Opinion and Order released on April 23, 1957 the Commission denied reconsideration of this action, but found Community Telecasting Company to be a party in interest within the meaning of Section 309(c) of the Act and ordered oral argument on the issues specified [1/] to determine whether the matters raised by those issues, assuming the facts in support of the issues to be true, are grounds for setting aside the grant in question.[2/]

256 3. Community, WKST and the Broadcast Bureau participated in the oral argument. It is now to be decided whether the protest should be denied as to those issues upon which oral argument was heard, or whether an evidentiary hearing should be ordered on some or all of those issues.

4. By issues 1 and 2, Community questions whether WKST, Inc. complied with Sections 3.651[3/] and 3.667 [4/] of our Rules in the operation

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1/ Six of the issues requested by protestant were rejected, no facts whatsoever being alleged in support thereof.

2/ In its Memorandum Opinion and Order a protest and petition for reconsideration of Jet Broadcasting Company were denied.

3/ Sec. 3.651(a) "All television broadcast stations will be licensed for unlimited time operation. Each station shall maintain a regular program operating schedule as follows: not less than two hours daily in any five broadcast days per week and not less than a total of twelve hours per week during the first eighteen months of the station's operation; not less than two hours daily in any five broadcast days per week and not less than a total of sixteen hours, twenty hours and twenty-four hours per week for each successive period of operation, respectively; and not less than two hours in each of the seven days of the week and not less than a total of twenty-eight hours per week thereafter. 'Operation' includes the period during which a station is operated pursuant to special temporary authority or during program tests, as well as the license period...." If, in the event of an emergency due to causes beyond the control of a licensee, it becomes impossible to continue operation, the Commission and the engineer in charge of the radio district in which the station is located

(footnote #3 & #4 continued on page 4)

of Station WKST-TV. The facts here are uncontroverted. In September, 1952, WKST, Inc. received a construction permit for a commercial television station on Channel 45 in New Castle, Pennsylvania, and in April, 1953, commenced operation. On February 2, 1954 an application for license was filed and shortly thereafter the Commission issued program test authority. On January 10, 1955, the Commission authorized the station to suspend operations for a period of 90 days commencing on January 14, 1955, and this authority was, on April 5, 1955, extended to July 14, 1955. On July 1, 1955, a further 90-day extension was requested. The Commission has taken no action on this last request.

5. Clearly, Section 3.667 of the Rules is inapplicable, for that section is concerned with the permanent discontinuance of station operation by licensees, whereas the facts here indicate that WKST, operating under authority other than a license, intended only a temporary suspension of operation.

257 6. Section 3.651 of the Rules must be read within the context of Commission policy. Over the years the Commission has granted broadcast licensees authorization to curtail operations beyond the point specified in our Rules or to remain silent where valid reasons therefor are presented. Such authorizations have frequently and consistently been granted in all the various broadcast services to permit efforts at financial reorganization in order to avoid if possible depriving the public of a broadcast service. This policy has been applied, for example, in aid of the objective of bringing an improved nationwide competitive television service to the public through more effective utilization of the UHF television band. Numerous requests for extension of completion date have

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3/ (cont.) shall be notified in writing immediately after the emergency develops and immediately after the emergency ceases and operation is resumed.

4/ Sec. 3.667 "The licensee of each station shall notify the Commission in Washington, D. C., and the engineer in charge of the radio district where such station is located of permanent discontinuance of operation at least two days before operation is discontinued. The licensee shall, in addition, immediately forward the station license and other instruments of authorization to the Washington, D. C. office of the Commission for cancellation."

been granted permittees. Numerous requests for authority to remain silent have been granted and the Commission has, as in this instance, permitted authorizations to remain silent to continue in effect pending further action by the Commission. The effect of this policy has not been to perpetuate monopolization of a channel by a non-operating licensee or permittee, but to recognize the generally more difficult financial conditions confronting UHF operators and thus to encourage the development of UHF television. As hereinbefore set forth, WKST-TV temporarily suspended operations with the Commission's full approval, and has remained silent pending Commission action on its request for a further extension of its authority for temporary suspension of operations. It is also long standing Commission practice to continue in effect an authorization, the extension of which is the subject of a request or application pending before it. (Also see Section 9(b) Administrative Procedure Act.) Thus the most that can be said is that if a violation of Section 3.651(a) of our Rules is deemed to have been committed, this has occurred with specific Commission authorization and could not constitute grounds for setting aside the grant protested. In our view, however, these circumstances constitute an effective waiver of that Section of our Rules and accordingly no violation is involved.

7. Protestant also urges that a grant of WKST-TV's application would contravene Section 3.607 of our Rules and the doctrine of the Ashbacher case.[5/] Its argument rests on the fact that prior to our Report and Order of October 22, 1956, which amended Section 3.606 of the Rules by making Channel 45 available to Youngstown-New Castle as a hyphenated community, the Channel was not available in Youngstown. This argument misconstrues the operation of our action of October 22, 1956. Channel 45 has not been deleted from New Castle; its availability has been extended to include Youngstown. Thus, we have not created a new channel allocation which is available for assignment unless the existing permittee abandons his authorization. The authorization under which

5/ Ashbacher Radio Corp. v. FCC, 326 US 327.

WKST-TV operated when the Channel 45 allocation was to New Castle is equally valid with the allocation to Youngstown-New Castle. There is no unoccupied facility for which application might be made at this time.

258 8. Although the protest suggested the possibility that a grant of the WKST application contravenes Sec. 307(b) of the Communications Act, no evidence in support thereof is contained in the pleadings and protestant did not discuss the matter at the oral argument. We are not aware of any facts which would indicate that Sec. 307(b) is properly an issue in this proceeding.

9. Issues 4 and 5 specified in our Memorandum Opinion and Order of April 17, 1957 are, in essence, "economic injury issues." Nothing said at the oral argument has served to alter the belief expressed in our Memorandum Opinion and Order of April 17, 1957, that with respect to the "economic injury" issues, even if the facts were proven no grounds are presented for setting aside the grant in question. Neither the Communications Act of 1934, as amended, nor Commission policy would furnish grounds for rescinding the grant to WKST, Inc. on the basis of the facts alleged. In re Application of Southeastern Enterprises, 22 FCC 605; Voice of Cullman, 6 RR 164; In re Application of Kaiser Hawaiian Village Radio, Inc., 22 FCC 941.

10. Protestant has offered no facts of which the Commission was unaware at the time it granted the application of WKST, Inc. to modify its construction permit. As set forth above, even if the facts relied on by protestant were to be proven, no grounds exist for setting aside the grant.

11. Accordingly, IT IS ORDERED, This 5th day of September, 1957, that the subject protest IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Evelyn F. Eppley
Acting Secretary

Released: September 9, 1957

*See attached Statement of Commissioner Bartley

259 STATEMENT OF COMMISSIONER BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I concur in that part of the Opinion which would deny the protest on Issues 1 and 2 (alleged violation of Rules) and on the "economic injury" issues, the latter for the reasons set forth in Voice of Cullman.

However, I am of the opinion that the effect of our action of October 22, 1956, was to create a new channel allocation in Youngstown, thus making it available for competing applications.

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262 [Received October 8, 1957 F.C.C. Mail & Files]

PETITION FOR REHEARING AND RECONSIDERATION

Comes now Community Telecasting Company pursuant to 47 U.S.C. 405 and respectfully requests the Commission for reconsideration and rehearing of its Memorandum and Order released September 6, 1957 in the above matter dismissing petitioner's protest of March 21, 1957 against the Commission's grant on February 20, 1957 of an application of WKST, INC.

Petitioner alleges and verily believes that the Commission's order of September 6, 1957 is unjust, unwarranted and/or erroneous, for the following reasons:

1. Said order concludes that failure of the Commission to take action on a purported request by WKST, INC. dated July 1, 1955 for authority to suspend operations for a period of 90 days is an effective waiver of Section 3.651 of the Commission's Rules requiring minimum daily operation.

The Commission's conclusion is clearly erroneous for three reasons. First, the Commission has no authority to waive its rules without a specific request from an applicant or licensee. Section 308 of the Act limits the Commission to modification of a construction permit only on written application. Obviously the rules were made to be enforced, all persons under the Commission's jurisdiction are required to

263 obey them, they have the force and effect of Federal law, and waiver cannot be implied. Secondly, the WKST request for extension of authority to suspend operations was for a period of 90 days only - even if it had been granted, the waiver would have expired by October 14, 1955, more than two years ago. Again, Section 308 of the Act prohibits the Commission from modifying the construction permit to permit non-use of Channel 45 without written application. Thirdly, the Commission has no authority under the Communications Act to grant a construction permit to an applicant, then allow the grantee to cease operations and continue to occupy a frequency. WKST commenced operation on April 15, 1953, applied for a license on February 2, 1954, and ceased operations on January 14, 1955. Under Section 301 of the Act, the Commission has authority only "to provide for the use" of Channel 45, and is specifically proscribed from giving anyone a vested interest in it. The Commission has no authority to allow WKST to occupy a channel for 2 1/2 years after it has ceased to use it. Non-use is abandonment in law and fact, and is demonstrably contrary to the public interest. Under Section 307 of the Act the Commission only has authority to license the use of a channel. It cannot permit WKST to occupy but not use Channel 45 with a license application pending.

2. The Commission's order is clearly erroneous when, in paragraph 5, it concludes that non-use of Channel 45 for 2 1/2 years is not permanent discontinuance. Such a conclusion of fact is arbitrary and unsupported by evidence. The evidence is quite the contrary - WKST never intended to operate again on Channel 45 at New Castle. Section 307 of the Act sets a maximum use and license period at 3 years, with no right of renewal until 30 days prior to expiration. The Commission has no authority under the act to permit unlicensed non-use, but exclusive occupancy, of Channel 45 for a period nearly equal to the license period.

264 3. Petitioner submits that paragraph 7 of said order is clearly erroneous when it concludes that Channel 45 has been continuously occupied since April 1953. If Section 3.607 prohibits application on any

but listed channels, and the hyphenated community of Youngstown-Newcastle did not come into the Section 3.606 Table of Assignments until October 22, 1956, the Commission's conclusion that the unlicensed, non-use of Channel 45 at Newcastle by WKST for 2 1/2 years in violation of the Act is occupancy is arbitrary.

4. The Commission's order is clearly erroneous in concluding in paragraph 8 there is no 307(b) issue. Petitioner has outlined herein several Section 307 problems. Further, the effect of granting the WKST application to move its transmitter to Youngstown from Newcastle raises a 307(b) question. Section 307(b) is concerned with "service", not main studio location. Service is measured in terms of population with contours of power intensity measured from the transmitter. The WKST studio could be on the moon - the service would still be to Youngstown if that is where the transmitter is located. Section 307(b) is concerned with by whom and where a station is heard.

5. Petitioner asks that the Commission reconsider its conclusion as to the economic issues referred to in paragraph 9 of its order. The public interest is not served when the Commission permits its licensing policy to interfere with development of the higher UHF channels through lower channel competition.

WHEREFORE, petitioner requests that the Commission (1) reconsider its order of September 6, 1957 dismissing petitioner's protest, (2) grant said protest and hold a hearing on same, and (3) grant oral argument on the matters raised in this petition for reconsideration.

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COMMUNITY TELECASTING COMPANY

By /s/ Carl L. Shipley
Its Attorney
982 National Press Building
Washington, D. C.

[Certificate of Mailing]

267 [Received October 18, 1957, F.C.C. Mail & Files]

OPPOSITION TO PETITION FOR REHEARING AND RECONSIDERATION

WKST, Inc., by its attorneys, herewith opposes the "Petition for Rehearing and Reconsideration" filed October 7, 1957 herein by Community Telecasting Company, protestant. In support whereof the following is shown:

1. Petitioner has not advanced any valid reasons for disturbing the Commission's September 6, 1957 Order dismissing its protest and refusing, after hearing, to set aside the February 20, 1957 modification grant to WKST-TV. By the generalized and conclusionary nature of its allegations, the petition fails to meet the "particularity" requirements of Section 1.390(e) of the Commission's Rules; indeed, there is even substantial question with respect to the procedural validity of the petition in the first instance.[1/]

268 2. The petition is repetitive of the many pleadings already filed by petitioner before the Commission and in the Court, and asks the Commission to consider the entire proceeding de novo. And like every pleading filed heretofore, the petition consists solely of an amorphous series of conclusionary generalizations unsupported by rationale, statutory interpretation, or discussion of precedents. Instead, those generalizations depend for their sole support upon three false premises which would ask the Commission to ignore the plain and basic scheme of the Communications Act and the Commission's administration thereof. Petitioner thereby seeks to delude the Commission into changing the established rules of the game and applying to this one case a new and special set of laws and rules devised by petitioner for its own private financial benefit.

1/ Repetitious petitions for reconsideration are not permitted. E. D. Rivers, Jr., 6 R.R. 765 (1950); City of Jacksonville, 7 R.R. 261 (1950). Petitioner's original protest, upon which hearing was held, was a type of petition for reconsideration. See Metropolitan Television Co. v. U. S., 12 R.R. 2001, 221 F. 2nd 879 (1955). It would therefore appear that petitioner's only recourse from the Commission's September 6, 1957 denial of its protest was to seek judicial review.

3. Petitioner's first false premise is that transmitter site location determines station location, regardless of where the main studios are situated. Indeed, petitioner says that it makes no difference if the studio is located "on the moon." This of course ignores the established principle that the selection and location of main studios indicates which community is to be the principal community to be served. The Tribune Company, 9 R. R. 719, 769; Richmond Newspapers, Inc., 11 R. R. 1234; Gulf Television Company, 12 R. R. 447; Houston Consolidated Television Co. v. F.C.C., 240 F. 2nd 409. It also ignores the fact that in first charging the Commission with the duty of equitably distributing radio service, Congress explicitly directed that

269 station location was to be the place "wherein the studio of the station is located and not where the transmitter is located." 2/ Finally it ignores the wide flexibility afforded to licensees in the selection of transmitter sites, because of the "varied factors entering into the selection of a site - factors such as terrain, local zoning regulations, air hazard considerations, economics, etc." 3/ The WKST-TV site has previously been shown to be the only one from which the station can adjust itself to the economic realities of its market, as recognized by the Commission's hyphenation order, and achieve for itself the economic basis which alone can support a New Castle television station. WKST-TV could not survive with its signal coverage limited to New Castle alone, while in direct competition with Youngstown stations blanketing New Castle. WKST-TV will remain a New Castle station; its main studios will remain there, its principals are longtime New Castle residents who also operate an AM station there, its local programming will be primarily oriented to the New Castle and Pennsylvania interests which it previously served for 21 months, and New Castle will receive the principal city grade signal specified by the Rules. There will be no

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2/ Sec. 5 of the 1928 amendments to the Radio Act of 1927, 45 Stat. at L. 373, chap. 263.

3/ Report and Order on Transmitter Site Location, 13 R. R. 1530(a).

loss of service to any area; the new WKST-TV service contours completely enclose the old WKST-TV service contours. Significantly, petitioner has not addressed itself to any of these undisputed facts.

270 4. Petitioner's second false premise is that the Commission's hyphenation action deleted the assignment of Channel 45 to New Castle and substituted a hybrid allocations entity - "Youngstown-New Castle," which is open for application. It is clear, however, that Channel 45 has not been deleted from New Castle and "Youngstown-New Castle" is not a hybrid allocations entity available for application as such. Hyphenation means only that when a channel is unoccupied and available, it may be applied for in either but not both of the listed hyphenated cities. FCC Rules, Section 3.607(b). Indeed, the Commission has rejected, after rule-making proceedings, a proposal to permit stations to serve both hyphenated cities as principal communities. Report and Order in Docket 11660, 22 F.R. 1782 (1957). Hyphenation is only an assignment tool; it does not mean that the channel is intended for the joint use of both communities. The Tribune Company, 9 R.R. 719, 770. By the location of its main studios the applicant or permittee selects the city to which its station is assigned. Ibid. There can be no such thing as a "Youngstown-New Castle station." Thus the addition of "-Youngstown" to "New Castle" in the Table of Assignments did not remove Channel 45 from New Castle; nor did it purport to disturb or preclude the continued use of Channel 45 in New Castle, if the New Castle permittee so desired. The permit granted to WKST-TV when the allocation was to New Castle is equally valid with the allocation to Youngstown-New Castle.

271 5. Petitioner's third false premise is that WKST-TV is not entitled to the protection afforded to it by the Communications Act and Administrative Procedure Act, but that the Commission's rule-making action deleted the WKST-TV permit without a hearing, thus opening up the channel for application by others. Section 312 of the Act, however, which spells out the only way in which permits may be revoked or vacated after completion of construction,[4/] requires that the Commission

4/ Section 319(b) provides for automatic forfeiture of permits only where construction has not been completed within the time specified in the permit or otherwise allowed by the Commission. That is not the case here, where WKST-TV completed all construction, operated for almost two years, and has maintained the station completely intact and in continuous readiness for resumption of operations pending transmitter site relocation.

must first hold an adjudicatory hearing in which it bears the burden of proof, and in which the permittee must be given notice and opportunity to be heard. The Commission could not delete the WKST-TV permit via legislative rule-making proceedings or by ex parte declaration, and it obviously did not intend to. This is true even assuming, arguendo, that it were possible for WKST-TV to have violated an FCC rule by suspending operations with Commission approval, as alleged by petitioner, because a Section 312 hearing must in any event be held before a permit may be vacated for violation of rules. WKST-TV's permit was covered by application for license and by program test authority, and the permit therefore remained valid to date under the express terms of Section 3.629 of the Commission's Rules and Section 9(b) of the Administrative Procedure Act. Petitioner has completely ignored the explicit protection afforded permittees and licensees by the Communications Act and
272 Administrative Procedure Act, and by the Commission's Rules and Regulations. Moreover, petitioner is in the wrong forum, complaining of the validity of the original permit in a proceeding involving only a modification of that permit. Petitioner's proper course, if it were to have applied for Channel 45, would have been to seek revocation of the original permit under Section 312 of the Act. If that permit had then been revoked before it was modified, Channel 45 would have been opened up for application. Petitioner did not pursue the proper course, however, and it is far too late to do so now.

6. When petitioner's three false premises are recognized, its petition falls of its own weight. Its broadside generalizations and conclusions are merely an attempt to avoid the specifics of the situation, and the application of the pertinent rules and statutes. That the petition fails to meet the "particularity" requirements of Section 1.390(e) is obvious.

7. Petitioner's shotgun approach to the subject of Section 307(b) is typical. The Commission's Order concluded that although the protest "suggested" the "possibility" of a Section 307(b) question (1) protestant did not discuss the matter at the oral argument; (2) its pleadings contained

no evidence in support thereof; and (3) the Commission was aware of no facts to indicate that Section 307(b) was properly in issue. To this, petitioner's only response is that "Petitioner has outlined herein several Section 307 problems. Furthermore the effect of granting the WKST application... raises a 307(b) question." This is no rebuttal to the Commission's conclusion. Petitioner has not cited one page of record to
273 show that it did discuss Section 307(b) in the hearing afforded to it; the record in fact reflects no such discussion. If, as petitioner claims, there was a Section 307(b) question, petitioner had ample opportunity to back up that claim in the oral hearing. Having refused that opportunity it cannot now demand reconsideration.

8. In any event no Section 307(b) question exists. All such considerations were entertained and disposed of in the Commission's October 17, 1956 rule-making order which hyphenated New Castle and Youngstown. Petitioner did not appeal from that action; it is too late to do so a year later.

9. Petitioner's approach to the so-called "economic issue" is similar. It merely asks reconsideration because "the public interest is not served when the Commission permits its licensing policy to interfere with development of the higher UHF channels through lower channel competition." Petitioner does not examine or discuss the Commission's reasoning, or the precedents cited in its Order. It says merely that the WKST modification grant was against the "public interest."

10. Petitioner's basic inability to make an economic argument is proven by its own hearing admissions. At page 7 of the hearing transcript, petitioner concedes that its Channel 73 station was not constructed during the two years of WKST-TV's suspended operations because it would have been impossible to compete with the two existing Youngstown stations. Thus petitioner has told the Commission that it could not construct in the presence of the two Youngstown stations <u>when WKST-TV</u>
274 <u>was not on the air</u>. The conclusionary and contradictory claim that the resumed operation of WKST-TV could have any conceivable effect on petitioner's still unconstructed station should therefore have

been rejected as frivolous and not entitled to consideration even as on demurrer. At the very least, WKST, Inc. submits that this is the strongest situation for the Commission to have rested its economic issue conclusion on policy considerations alone, rather than on considerations of both policy and statutory authority. It is requested, therefore, that upon reconsideration the Commission revise its Order so as to eliminate any disclaimer of statutory authority to consider economic effects of its grants in proper situations. It is further requested that the Commission base its economic conclusions herein on the fact that petitioner's allegations of economic injury stemming from the WKST-TV grant are frivolous, and that in the circumstances presented, no grounds have been presented for setting aside the grant.

11. The remainder of petitioner's arguments either repeat contentions already considered and rejected by the Commission, or miscomprehend the basis of the Commission's Order. Petitioner's entire first argument assumes that a purported waiver of Rule 3.651 constituted a modification of WKST-TV's construction permit, for which no application had been filed. This assumption is untenable. Petitioner fails to recognize the elementary fact that a construction permit is not an operational authorization, and therefore need not be modified upon
275 suspension of a station's operations.[5/] Petitioner overlooks the real question, which is whether, assuming that the WKST-TV suspension did not conform to Rule 3.651 despite the Commission's approval of such suspension, such fact could constitute grounds for the institution of proceedings to revoke the WKST-TV permit. The question answers itself in a most emphatic negative.

5/ In any event, even if petitioner's assumption that waiver of Rule 3.651 constituted a modification of permit were true, its contention that Section 308 requires an application therefor is nonetheless without merit. See Peoples Broadcasting Company v. U. S., 209 F. 2nd 286 (1953).

12. Finally, petitioner rehashes the "abandonment" argument which the Commission has already considered and rejected. Nothing new has been added. Suffice it to say that petitioner's peculiar theory, if accepted by the Commission, would require the conclusion that petitioner has abandoned its own Channel 73 permit and has thereby lost any and all pretense to standing in this proceeding. For petitioner has sat on its permit for two years without ever constructing its station. On two occasions it has sought to relinquish Channel 73 and secure either Channel 33 or Channel 45. By its own logic, it has effectively abandoned and forfeited its Channel 73 permit, unless it would apply a harsher rule to those who have constructed and operated in good faith than to those who promise the Commission immediate construction and then proceed to do absolutely nothing except backwater.

276 WHEREFORE, it is respectfully submitted that the petition for rehearing and reconsideration should be denied.

Respectfully submitted,

Law Offices of Robert F. Jones

By /s/ Robert F. Jones

By /s/ Warren C. Zwicky

277 [Certificate Of Service]

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278 MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde not participating; Commissioner Bartley concurring in the result and issuing a statement.

1. By Memorandum Opinion and Order of September 5, 1957 the Commission dismissed, after oral argument thereon, the protest filed pursuant to Section 309(c) of the Communications Act of 1934, as amended, by Community Telecasting Company to grant of the above-entitled application. The Commission now has before it a petition for rehearing and reconsideration of this action filed on October 7, 1957 by Community

Telecasting Company and an opposition thereto filed on October 17, 1957 by WKST, Inc.

2. Petitioner alleges error in the statement that in our view the circumstances here present have led to an effective waiver of Section 3.651(a) of our Rules and accordingly no violation is involved. We fail to see what materiality this contention has as we also stated "Thus the most that can be said is that if a violation of Section 3.651(a) of our Rules is deemed to have been committed, this has occurred with specific Commission authorization and could not constitute grounds for setting aside the grant protested." Our decision therefore makes it apparent that, although we determined that no violation had occurred, under the circumstances present whether one did occur is immaterial to the purposes of this proceeding.

3. Petitioner also alleges error in our conclusion that making Channel 45 available to either Youngstown, Ohio, or New Castle, Pennsylvania rather than restricting it to New Castle did not create a new allocation open to all applicants. The contention advanced in support of this charge is in substance that Section 3.607 of the Rules prohibits application on any but listed channels and the hyphenated community of Youngstown-New Castle did not appear in Section 3.606 (Table of Assignments) until after the rule-making proceeding in Docket No. 11766. This is the same argument rejected in our decision and, as we there pointed out, this argument misconstrues the operation of our action of October 22, 1956 in that proceeding. Section 3.607(b) of the Rules provides that channels are open for application in the communities listed in the Table

279 of Assignments. It specifically provides that "Where channels are assigned to two or more communities listed in combination in the Table of Assignments the provisions of this paragraph shall apply separately to each community so listed." Thus our action in the rule-making proceeding did nothing more, and nothing more was intended, than to make channel 45 available for use in either Youngstown or New Castle, not Youngstown and New Castle jointly.[1/] The principal effect

1/ In the Matter of Amendment of Part 3 of the Rules and Regulations Governing Main Studio and Station Identification of Television Stations,
(continued on page 18)

of our action therein was, should channel 45 become available for assignment through surrender or revocation of the construction permit held by WKST, Inc., to make it available for assignment to either New Castle or Youngstown.[2/] Accordingly, the grant here protested in no manner affects the availability of this channel for assignment to other parties. Such availability could arise only upon a voluntary surrender of its permit by WKST, Inc.; through revocation of the construction permit in accord with the statutory provisions of Section 312 of the Communications Act of 1934, as amended; or through refusal of the Commission to grant a renewal of license pursuant to the provisions of Sections 308 and 309 of the Act. Consequently, there is no merit in petitioner's further argument that our action in Docket No. 11766 created a new allocation. We similarly see no merit and nothing new in petitioner's contentions reiterated herein that there had been an abandonment of its permit by WKST, Inc. Commission policy and practice over the years together with the reason therefor as applied to circumstances wherein a licensee or permittee has found it necessary to temporarily suspend operations were set forth in our memorandum. The application of this policy to UHF television station permittees was also set forth. Because of this policy petitioner has been permitted to retain a construction permit for Station WXTV on Channel 73 at Youngstown since November 2, 1955 without having placed the station in operation. This policy, as applied to both WKST, Inc. and to petitioner, we believe to have been in full accord with the provisions of the Communications Act and the public interest standard contained therein. It unquestionably has preserved the service to the public from Station WKST-TV which resumed operation on October 31, 1957 and is the only local television service in the city of New Castle. Our application of this policy to petitioner has been for the reason that we believed it could result in an additional service to the city of Youngstown and its application in both instances has constituted an overall part of our

1/ (continued) Docket No. 11660 (FCC 57-239) the Commission specifically rejected hyphenation as a criterion for authorizing the official identification of a television station with more than one city.

2/ All assignments are subject to competitive applications at the time of submission of applications for renewal of license.

efforts to advance the interests of UHF television. These actions we believe to have been in the public interest.

280 4. Petitioner's arguments here made as to Section 307(b) are without substance. That the location of the main studio controls the location of the station rather than transmitter location is too well settled to warrant discussion. WKST remains a New Castle station.

5. One further matter is presented, the request of WKST, Inc. set forth in its opposition herein that we modify our conclusions to hold that petitioner's claims of economic injury are frivolous and that in the circumstances no grounds have been presented for setting aside the grant. We adhere to our previous conclusions in this regard "that with respect to the 'economic injury' issues, even if the facts were proven, no grounds are presented for setting aside the grant in question. Neither the Communications Actof 1934, as amended, nor Commission policy would furnish grounds for rescinding the grant to WKST, Inc., on the basis of the facts alleged."

6. In view of the foregoing IT IS ORDERED, That the said petition of Community Telecasting Company for rehearing and reconsideration and the request of WKST, Inc. contained in its opposition thereto ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Mary Jane Morris
Secretary

Adopted: November 20, 1957

Released: November 21, 1957

*STATEMENT OF COMMISSIONER BARTLEY
CONCURRING IN PART AND DISSENTING IN PART

I concur, except with respect to paragraph 3 of the Memorandum Opinion; and as to that, I adhere to my dissent to the Opinion and Order of September 5, 1957 (See 23 FCC 357)

[Filed December 2, 1957]

NOTICE OF APPEAL

Community Telecasting Company herewith gives notice of appeal from a decision of the Federal Communications Commission released September 9, 1957 dismissing Community's protest of a grant without hearing by the Commission on February 20, 1957 of an application of WKST, Inc. to modify its construction permit.

On October 7, 1957 appellant filed a petition for rehearing and reconsideration by the Commission of its September 9 order and opinion dismissing appellant's protest under Section 309(c) of the Communications Act of 1934, as amended. On November 20, 1957 the Commission denied appellant's said petition.

This appeal is taken as permitted by law (47 U.S.C. 402(b)) from the Memorandum Opinion and Order of the Commission dated September 5, 1957 and released September 9, 1957 in Docket No. 11998 dismissing Community Telecasting Company's protest, and is also taken from the Memorandum Opinion and Order of the Commission in Docket No. 11998 adopted November 20 and released November 21, 1957, denying Community's petition for rehearing.

A concise statement of the reasons upon which appellant intends to rely is as follows:

1. Said September 9 order concludes that failure of the Commission to take action on a purported request by WKST, Inc. dated July 1, 1955 for authority to suspend operations for a period of 90 days is an effective waiver of Section 3.651 of the Commission's Rules requiring minimum daily operation.

The Commission's conclusion is erroneous for three reasons. First, the Commission has no authority to waive its rules without a specific request from an applicant or licensee. Section 308 of the Act limits the Commission to modification of a construction permit only on written application. Secondly, the WKST request for extension of authority to suspend operations was for a period of 90 days only - even if it had been granted, the waiver would have expired by October 14, 1955,

more than two years ago. Again, Section 308 of the Act prohibits the Commission from modifying the construction permit to permit non-use of Channel 45 without written application. Thirdly, the Commission has no authority under the Communications Act to grant a construction permit to an applicant, then allow the grantee to cease operations and continue to occupy a frequency. WKST commenced operation on April 15, 1953, applied for a license on February 2, 1954, and ceased operations on January 14, 1955. Under Section 301 of the Act, the Commission has authority only "to provide for the use" of Channel 45, and is specifically proscribed from giving anyone a vested interest in it. The Commission has no authority to allow WKST to occupy a channel for 2 1/2 years after it has ceased to use it.

2. Under Section 307 of the Act the Commission only has authority to license the use of a channel. It cannot permit WKST to occupy but not use Channel 45.

3. The Commission's order is erroneous when, in paragraph 5, it concludes that non-use of Channel 45 for 2 1/2 years is not permanent discontinuance. Section 307 of the Act sets a maximum use and license period at 3 years, with no right of renewal until 30 days prior to expiration. The Commission has no authority under the Act to permit unlicensed non-use, but exclusive occupancy, of Channel 45 for a period nearly equal to the license period.

4. Paragraph 7 of said order is erroneous when it concludes that Channel 45 has been continuously occupied since April 1953. If Section 3.607 prohibits application on any but listed channels, and the hyphenated community of Youngstown-Newcastle did not come into the Section 3.606 Table of Assignments until October 22, 1956, the Commission's conclusion that the unlicensed, non-use of Channel 45 at Newcastle by WKST for 2 1/2 years in violation of the Act is occupancy is arbitrary.

5. The Commission's order is erroneous in concluding in paragraph 8 there is no 307(b) issue. Appellant has outlined herein several Section 307 problems. Further, the effect of granting the WKST

application to move its transmitter to Youngstown from Newcastle raises a 307(b) question. Section 307(b) is concerned with "service", not main studio location. Service is measured in terms of population with contours of power intensity measured from the transmitter. Section 307(b) is concerned with by whom and where a station is heard.

6. The Commission's conclusion as to the economic issues referred to in paragraph 9 of its order is erroneous. The public interest is not served when the Commission permits its licensing policy to interfere with development of higher UHF channels through lower channel competition.

7. The Commission erred in denying appellant's petition for reconsideration because said petition raised new issues as to Sections' 307 and 308 of the Communications Act, as set out herein, and the public interest requires a rehearing on these issues.

COMMUNITY TELECASTING COMPANY

By _____

Carl L. Shipley

Its Attorney

[Certificate Of Service]

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,241 **989**

COMMUNITY TELECASTING COMPANY (WXTV),

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Intervenor

WKST, INC.,

Intervenor

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 12 1957

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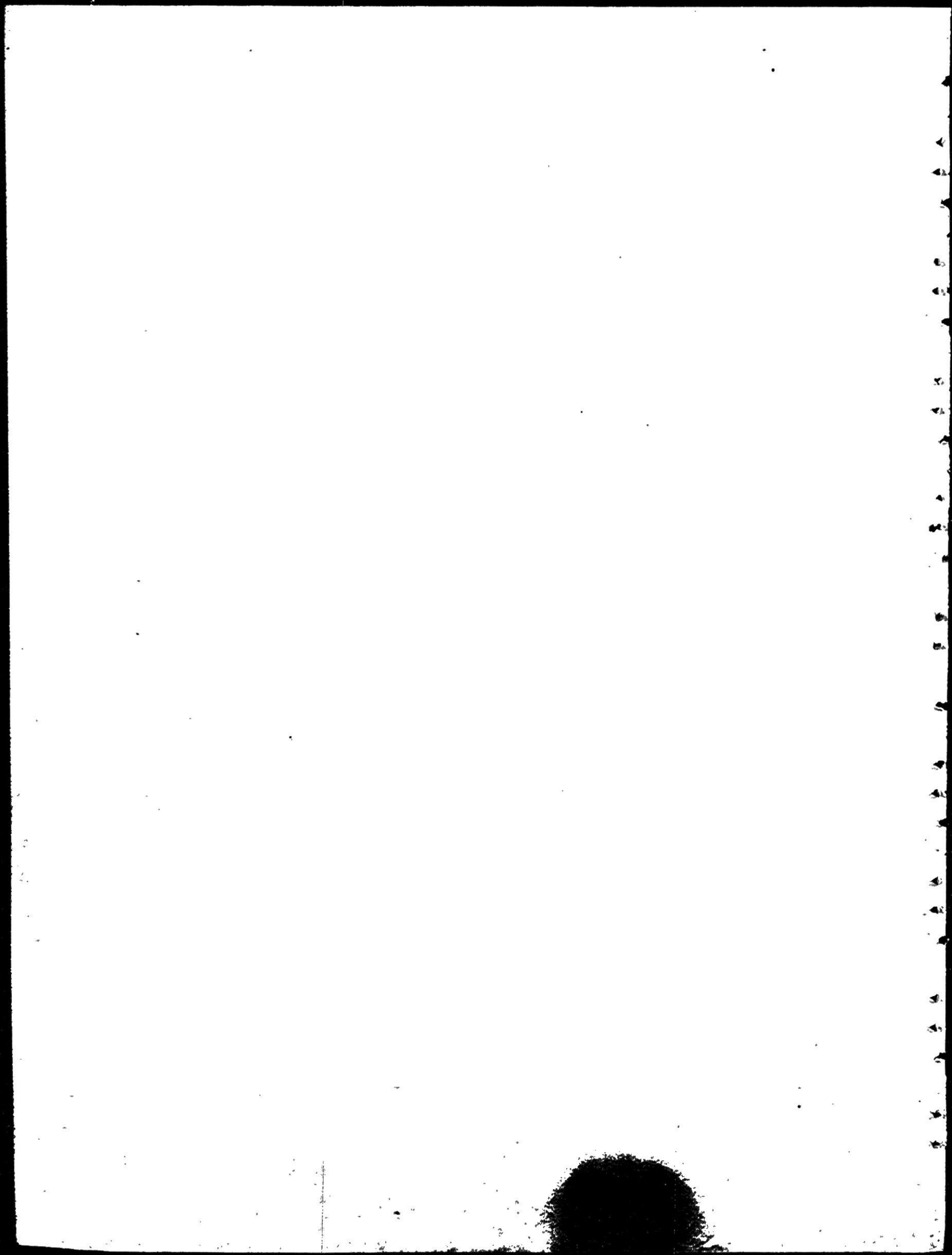
EX 3-0625



STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission erred in holding that its own failure to act on WKST's request for authority to suspend operations is an effective waiver of Section 3.651 of the Commission's Rules?

2. Whether the Commission erred in holding that Section 3.667 of its Rules is inapplicable to a permittee which has a license application on file and permanently discontinues operation?

3. Whether Section 307(h) is properly an issue in this proceeding, and whether the Commission has complied with that section of the Communications Act?

4. Whether the grant of WKST's application contravenes Section 3.607 of the Commission's Rules and the doctrine of the Ashbaker case?

5. Whether the Commission's policy on "economic injury" issues is in accordance with the public interest provisions of the Communications Act?

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,241

COMMUNITY TELECASTING COMPANY (WXTV)

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Intervenor

WKST, INC.,

Intervenor

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to the provisions of 47 U.S.C. 402(b).

Decision Below

The decision of the Federal Communications Commission from which appellant appeals is set forth in the record herein at page 278.

STATEMENT OF THE CASE

On April 23, 1957 the Commission issued its Memorandum Opinion and Order in Docket No. 11998 denying in part the protest of Communnity Telecasting Company (WXTV), appellant herein, against the grant without hearing on February 20, 1957, of an application by WKST to modify its construction permit to substitute Channel 45 at Youngstown-Newcastle for Channel 45 at Newcastle, Pa. The background facts are set forth in detail in appellant's protest (R. 62). Briefly stated, appellant (WXTV) was granted a construction permit for UHF TV Channel 73 at Youngstown, Ohio on November 2, 1955. Intervener WKST was granted a construction permit for UHF TV Channel 45 at Newcastle, Pa. on September 4, 1952. These assignments were made to the parties under Section 3.607(a) of the Commission's Rules, which provides that applications may only be filed for the channels at the communities listed in the Table of Assignments in Section 3.606(b) of said Rules. On October 22, 1956 the Commission amended its Table of Assignments and changed Channel 45, which had been previously occupied by WKST, from Newcastle, Pa. to Youngstown, Ohio-Newcastle, Pa. as a hyphenated community (a hyphenated community is one which includes two towns, and an applicant can apply for operation in either (3.607(b)). At the time of this amendment, WKST was closed down, and had been since it ceased operations, for economic reasons, on January 14, 1955. Both WXTV and WKST had previously petitioned the Commission for lower channel assignments at Youngstown in order to compete more favorably with the network TV stations located at Youngstown on lower channels, without success. After the Commission amended its Table of Assignments in Section 3.606 of the Rules to list Channel 45 as available at Youngstown, both WXTV and WKST applied to the Commission to amend their construction permits to specify Channel 45 at Youngstown. The WKST application was filed on November 16, 1956, and the WXTV

application was filed on November 20, 1956. WXTV also requested that its application be given a comparative hearing with that of WKST as the two were mutually exclusive. On February 20, 1957 the Commission granted WKST's application without hearing and dismissed WXTV's application. On March 21, 1957 appellant (WXTV) filed with the Commission a protest and petition for reconsideration, pursuant to Sections 309(c) and 405 of the Communications Act, directed against the grant without hearing of WKST's application, and asking reconsideration of the dismissal of its own application. The Commission on April 23, 1957 released its decision granting in part and denying in part the protest, ordering oral argument on certain issues raised by WXTV, and denying the petition for reconsideration of the dismissal of WXTV's application for Channel 45 at Youngstown. In the order the Commission refused to stay the effective date of the WKST grant. An appeal was taken from the Commission's order of April 23, 1957. (No. 13, 872) By Memorandum Opinion and Order dated September 5, 1957, the Commission dismissed, after oral argument thereon, Community's protest under Section 309(c) to the grant of the WKST application. On October 7, 1957 Community filed a petition for reconsideration of said order, which the Commission denied on November 20, 1957. This appeal is from that order and from the order of September 5 dismissing community's protest.

STATUTES AND REGULATIONS INVOLVED

Rules and Regulations of the Federal Communications Commission:

3.606(a) (After October 23, 1956)

"The following table of assignments contains the channels assigned to the listed communities in the United States* * *"

3.606(b)	Channel No.
"Ohio * * *	
Youngstown (also see Youngstown, Ohio-Newcastle, Pa.)	21, 27, 73
* * * Youngstown, Ohio-Newcastle, Pa.	45
Newcastle (See Youngstown Ohio-Newcastle, Pa.)"	--

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Youngstown (also see Youngstown, Ohio-Newcastle, Pa.)	21, 27, 73
* * * Youngstown, Ohio-Newcastle, Pa.	45
Newcastle ([illegible] Youngstown Ohio-Newcastle, Pa.)"	--

3.606(b) (Prior to October 23, 1956) Channel No.

"Ohio * * *

Youngstown	21, 27, 73
Pennsylvania	
Newcastle"	45

3.607(a)

"* * * Applications may be filed to construct television broadcast stations only on the channels assigned in the Table of Assignments (3.606(b)) and only in the communities listed therein."

3.607(b)

"A channel assigned to a community listed in The Table of Assignments is available upon application in any unlisted community which is located within 15 miles of the listed community.
* * * Where channels are assigned to two or more communities listed in combination in the Table of Assignments the provisions of this paragraph shall apply separately to each community so listed."

3.613

"The main studio of a television station shall be located in the principal community to be served."

3.651

"Each such (TV) station shall maintain a regular operating schedule as follows * * * not less than 12 hours per week * * *."

3.667

"The licensee shall (upon permanent discontinuance of operation) * * * immediately forward the station license and other instruments of authorization to the Washington, D.C. office * * *."

STATUTES

47 U.S.C. 301 (Communications Act (47USC 301))

"It is the purpose of this chapter * * * to provide for the use of such channels, but no ownership thereof, by persons for limited periods of time * * *".

47 U.S.C. 307(b)

"In considering applications for licenses * * * the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

47 U.S.C. 308

"The Commission may grant construction permits and station licenses, or modifications on renewals thereof, only upon written application therefor * * *."

47 U.S.C. 309(a)

"If upon examination of any application * * * the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

47 U.S.C. 309(b)

"If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of

hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

47 U.S.C. 309(c)

"When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application

issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necesary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commissioner shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

SUMMARY OF ARGUMENT

For summary of argument Appellant incorporates by reference the Summary of Argument in Brief for Appellant in Case No. 13872.

ARGUMENT

I Failure of the Commission to act on WKST's request for authority to suspend operations is not an effective waiver of Section 3.651 of the Commission's Rules

The Commission's order of September 5, 1957 is erroneous in that it concludes that failure of the Commission to take action on a purported request by WKST, INC. dated July 1, 1955 for authority to suspend operations for a period of 90 days is an effective waiver of Section 3.651 of the Commission's Rules requiring minimum daily operation.

The Commission's conclusion is clearly erroneous for three reasons. First, the Commission has no authority to waive its rules without a specific request from an applicant or licensee. Section 308 of the Act limits the Commission to modification of a construction permit only on written application. Obviously the rules were made to be enforced, all persons under the Commission's jurisdiction are required to obey them, they have the force and effect of Federal law, and waiver cannot be implied. Secondly, the WKST request for extension of authority to suspend operations was for a period of 90 days only - even if it had been granted, the waiver would have expired by October 14, 1955, more than two years ago. Again, Section 308 of the Act prohibits the Commission from modifying the construction permit to permit non-use of Channel 45 without written application. Thirdly, the Commission has no authority under the Communications Act to grant a construction permit to an applicant, then allow the grantee to cease operations and continue to occupy a frequency. WKST commenced operation on April 15, 1953, applied for a license on February 2, 1954, and ceased operations on January 14, 1955. Under Section 301 of the Act, the Commission has authority only "to provide for the use" of Channel 45, and is specifically proscribed from giving anyone a vested interest in it. The Commission has no authority to allow WKST to occupy a channel for 2 1/2 years after it has ceased to use it. Non-use is abandonment in law and fact, and is demonstrably contrary to the public interest. Under Section 307 of the Act the Commission only has authority to license the use of a channel. It cannot permit WKST to occupy but not use Channel 45 with or without a license application pending.

II The Commission erred in concluding Section 3.667 of its Rules applies only to licensees

In its order of September 5, 1957 the Commission holds Section 3.667 of its Rules, requiring immediate turning in of a license or other instruments of authorization upon discontinuance of operation,

does not apply to WKST, since it only had a license application on file, and was operating on program test authority. Under Section 301 of the Act (47 U.S.C. 301) the Commission can only authorize use of a channel "for limited periods of time, under license(s)." Under Section 307(d) of the Act (47 U.S.C. 307) no license can be granted "for a longer term than three years." Surely the Commission cannot lift itself by its own bootstraps by granting program test authority and allowing a station to operate commercially without a license for an indeterminate period. Yet in the case at bar that is what the Commission seems to suggest it can do. Under Section 301 of the Act a station cannot operate commercially without a license, regardless of past Commission practice. If a station cannot meet licensing standards after construction is complete, it should not operate on a commercial schedule - program tests are just what the name implies, a test, and not a license. Yet by the Commission's own acknowledgement of uncontroverted facts (Par. 5, Order dated September 5, 1957), WKST operated from April 1953 to January 1955. Therefore, WKST was in substance a licensee bound by the provisions of Section 3.667 of the Rules. The Commission cannot interpret its Rules so as to evade the clear intent of the law.

The Commission's order is clearly erroneous when, in paragraph 5 of its September 5 order it concludes that non-use of Channel 45 for 2 1/2 years is not permanent discontinuance. Such a conclusion of fact is arbitrary and unsupported by evidence. The evidence is quite the contrary - WKST never intended to operate again on Channel 45 at Newcastle and said so. Section 307 of the Act sets a maximum use and license period at 3 years, with no right of renewal until 30 days prior to expiration. The Commission has no authority under the act to permit unlicensed non-use, but exclusive occupancy, of Channel 45 for a period nearly equal to the license period.

III Section 307 of the Communications Act is properly an issue in this case

The Commission's September 5, 1957 order is clearly erroneous in concluding in paragraph 8 there is no 307(b) issue. Petitioner has outlined herein several Section 307 problems. Further, the effect of granting the WKST application to move its transmitter to Youngstown from Newcastle raises a 307(b) question. Section 307(b) is concerned with "service", not main studio location. Service is measured in terms of population with contours of power intensity measured from the transmitter. The WKST studio could be on the moon - the service would still be to Youngstown if that is where the transmitter is located. Section 307(b) is concerned with by whom and where a station is heard. Section 307 is an issue in every case whether specifically reused or not.

IV The WKST grant contravenes Section 3.607 of the Commission's Rules and the Ashbacker doctrine.

This issue is treated on page 14, under heading VI in Community's brief in Case No. 13,872, consolidated herewith, and incorporated by reference.

Petitioner submits that paragraph 7 of said order is clearly erroneous when it concludes that Channel 45 has been continuously occupied since April 1953. If Section 3.607 prohibits application on any but listed channels, and the hyphenated community of Youngstown-Newcastle did not come into the Section 3.606 Table of Assignments until October 22, 1956, the Commission's conclusion that the unlicensed, non-use of Channel 45 at Newcastle by WKST for 2 1/2 years in violation of the Act is occupancy and is arbitrary.

V The Commission's policy on "economic issues" is not in accord with the public interest requirements of the Communications Act.

Under Section 307 of the Act, the Commission can only issue authorizations "if the public interest * * * will be served thereby" (47 U.S.C. 307). Community has treated with this issue on page 11, under heading IV of its brief in Case No. 13,872, consolidated with the instant case, and incorporated herein by reference.

The Commission's conclusion as to the economic issues referred to in paragraph 9 of its order is erroneous. The public interest is not served when the Commission permits its licensing policy to interfere with development of the higher UHF channels through lower channel competition.

CONCLUSION

Appellant considers that the Commission's actions of April 23, September 5, and November 20, 1957 are all interrelated and have been consolidated for review by this Court in cases No. 13,872 and 14,241 for that reason. For the reasons stated appellant submits the actions of the Commission should be set aside and the cases remanded with instructions to set aside the grant to WKST and hold a comparative hearing among qualified applicants for Channel 45 at Youngstown-Newcastle.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

No. 14,241

FILED JAN 6 1958

COMMUNITY TELECASTING COMPANY, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., WKST, INC., Intervenors

ON APPEAL FROM OPINION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission erred in holding that Section 3.651 of its Rules did not operate to terminate or cause forfeiture of WKST's permit.

2. Whether the Commission erred in holding that Section 3.667 of its Rules was not applicable to WKST in this case.

3. Whether the Commission failed to comply with Section 307(b) of the Communications Act.

4. Whether the protested grant contravenes Section 3.607 of the Commission's Rules and the holding of the Ashbacker case.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,241

COMMUNITY TELECASTING COMPANY, Appellant

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FEDERAL COMMUNICATIONS COMMISSION, Appellee

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

WKST, INC., Intervenors

ON APPEAL FROM OPINION AND ORDER OF THE

FEDERAL COMMUNICATIONS COMMISSION

COUNTERSTATEMENT OF THE CASE

A complete statement of the facts through April 23, 1957 is contained in our brief in Case No. 13,872.

Oral argument on certain issues specified in Community's protest, as ordered by the Commission on April 23, was held on May 20. (R. 207-244) Community also filed a brief on May 20. (R.245-249) On September 9 the Commission released its Memorandum Opinion and Order (R. 255-259) dismissing Community's protest. The Commission rejected Community's legal arguments, stating that "even if the facts relied on by protestant were to be proven, no grounds exist for setting aside the grant." (R. 258) Jet Broadcasting Company, though not a party to the proceedings on Com-

munity's protest, appealed from the Memorandum Opinion and Order (Case No. 14,155).

Community petitioned the Commission for reconsideration of its Memorandum Opinion and Order (R. 262-265). On November 21 the Commission denied the petition (R. 278-280). Meanwhile, on October 31 the intervenor, WKST resumed television broadcasting, in accordance with the modified construction permit which is the subject of all these appeals. (R. 279) 1/ The order of November 21 was appealed by Jet (No. 14,236) and Community (No. 14,241).

1/ WKST, having completed construction in accordance with its modified permit, filed a license application and a request pursuant to Section 3.629 of the Commission's Rules, for program test authority to operate pending Commission action on the license on October 25, 1957. The latter request was granted on October 28, 1957.

SUMMARY OF ARGUMENT

Intervenor's construction permit was still outstanding in November, 1956, when appellant filed an application for the same channel. None of the sections of the Commission's Rules cited by appellant served to cause any forfeiture of this permit during the period that intervenor suspended its program test operations (with Commission approval); these sections are not applicable here. The Commission has adopted a policy, dictated by compelling circumstances of allowing construction permits for UHF television stations to remain in effect for comparatively long periods. Appellant itself has enjoyed the benefits of this policy. Furthermore, there is no authority for declaring intervenor's permit forfeited.

No question was presented in regard to Section 307(b) of the Communications Act by the modification being appealed here, since interwenor's station will continue to be a New Castle station, with its main studio there. All the facts of programming and ownership support this designation as a New Castle station. The only fact cited by appellant to show that intervenor's station will be a Youngstown station is the new transmitter site; but this Court has held that location of transmitter does not determine which is the principal city a station serves.

Appellant failed to show any way in which the public interest would be affected adversely if intervenor's station should cause

competitive injury to appellant. But private competitive loss is not a ground, under the Communications Act, for preventing any Commission action -- only the public interest is to be considered. Appellant's real complaint is against the allocation of channels in the Youngstown-New Castle area, a matter which is not in issue in these consolidated cases.

I. WKST HAS HAD A VALID, OUTSTANDING CONSTRUCTION PERMIT FOR CHANNEL 45 AT NEW CASTLE, PENNSYLVANIA AT ALL TIMES FROM 1953 TO THE PRESENT

Almost the entire argument in Community's brief in Case No. 14,241 is devoted to the proposition that by action of Sections 3.651 and 3.667 of the Commission's Rules, and as a result of the provisions of the Communications Act, WKST must be considered to have abandoned any instrument of authorization it might have had for Channel 45 at New Castle. Accordingly, it appears to be contended, when WKST applied in November 1956 to modify its construction permit to specify a new antenna site on the outskirts of Youngstown, it should have been considered as if it was a new applicant for these facilities, and appellant's application to modify the construction permit it held for a station in Youngstown to specify Channel 45 in lieu of 73 should have been given comparative consideration with that of WKST.

We have discussed this matter at considerable length in Point I of our brief in Cases No. 13,872 and 13,873 (see pp. 10-22 and particularly pp. 15-19). The Court's attention is respectfully directed to our argument there. Nevertheless, at the risk of some repetition, it is believed that a brief restatement here of the Commission's position may be of assistance to the Court.

Much of the difficulty in Community's position results from its confusion of two separate instruments of authorization issued to WKST: its <u>construction permit</u> for a station on Channel 45 at New Castle, the modification of which was the sub-

ject of the protest here, and the program test authority issued to WKST on February 12, 1954 for operation of station WKST pursuant to the terms of its then outstanding construction permit. Operation pursuant to this program test authority was suspended by order of the Commission on January 14, 1955 upon request of WKST, in order for it to seek a more feasible method of operation.

It is the Commission's position here that the construction permit, originally issued on September 4, 1952, and modified on June 2, 1953, to reflect equipment changes, remained in effect throughout the entire period in question up through and including both November 6, 1956, when WKST applied to modify its permit to specify the new "Youngstown" antenna site, and February 20, 1957, when it was granted. If this is the case, it is established that the channel was occupied and Community was not entitled to comparative hearing with WKST at these latter dates. See United Detroit Theatres Corp. v. Federal Communications Commission, 85 U.S. App. D.C. 239, 178 F.2d 700; cf. Radio Station WOW, Inc. v. Federal Communications Commission, 87 U.S. App. D.C. 266, 184 F.2d 257.

It appears to be Community's position that because WKST, for approximately a year and a half during this period, operated pursuant to the program test authority mentioned above, but subsequently suspended such operation, WKST's lawful occupancy of the channel must be deemed to have been terminated. In part this is based on the completely erroneous argument that since

Section 301 of the Act talks in terms of the use or operation of channels "in accordance with this Act and with a license in that behalf granted under the provisions of this Act", only a "license" for such use, within the meaning of Section 3(bb) of the Act, can be considered as an occupation of a channel, precluding competing applications. Since the "program test authority" originally issued to WKST in February 1954 was a "license" for the operation of WKST within the meaning of Sections 301 and 3(bb) of the Act, and is the only "license" issued to WKST prior to its modification application, Community is able to argue under its theory that this authority was terminated by action of Sections 3.651(a) and 3.667 of the Commission's Rules and as a result of the "abandonment of" operation pursuant to the authorization to suspend.

As we pointed out in our earlier brief (pp. 15-19) and as the Commission has since reiterated in its decision of September 9, 1957 dismissing, after oral argument, appellant's protest (R. 255-257) and again (with respect to Section 3.651(a)) in its memorandum opinion of November 20, 1957 denying Community's petition for rehearing (R. 278), these arguments are incorrect on their own terms. Section 3.651(a), which <u>is</u> applicable to program tests, merely provides the minimum hours for operation thereunder. If it had been technically violated by WKST (and the Commission determined it had not, but had been effectively waived by Commission approval of WKST's first request to remain silent and failure to act on its subsequent request (R. 257, 278)), it would not have constituted grounds for setting aside the pro-

tested modification of WKST's construction permit, or, for that matter, of the program test authority itself. Section 3.667 does not apply to program tests at all but only to abandonment of regular station licenses issued under Section 319(c) of the Act,[2/] and in any event only applies to permanent abandonments, whereas WKST's suspension of program test operation was expressly stated to be only temporary (R. 257).

But, more important, all of this discussion of the continuing validity of the program test authority is irrelevant to the real question before the Court -- the continuing validity of the WKST construction permit which was modified in the protested action. On this question Community says little if anything in either of its briefs here, or in its pleadings and oral argument before the Commission. Yet it is clear that the permit did remain in effect.

2/ "License" is not used in the same sense in the Rule as it is in the statute. The statute (Section 3(bb)) defines "license" to include any instrument of authorization for broadcasting, including program test authority. This definition was adopted as part of the "Communications Act Amendments, 1952", 66 Stat. 711, in order to protect the holders of lesser grade operating authorizations. Cf. Crosley Corp. v. Federal Communications Commission, 70 U.S. App. D.C. 312, 106 F.2d 833. Thus WKST did have a "license", in that sense, in compliance with Section 301 of the Communications Act. But the Commission's Rules generally use "license" in a different sense, i.e., the regular, three year, renewable operating authority granted under Section 319 of the Communications Act. "All television broadcast station licenses will be issued for a normal license period of three years." Rules, 3.630. However, Section 3.629(a) of the Commission's Rules expressly provides that, "The granting of program test authority shall not be construed as approval by the Commission of the application for station license." When Commission rules governing the operation of a station are intended to apply to program tests they expressly so state, as in the case of Section 3.651(a): "operation includes the period during which a station is operated pursuant to special temporary authority or during program tests, as well as the license period...". (emphasis added)

Unlike licenses, which, in the case of broadcast stations, are limited by the provisions of Section 307(d) to terms of three years, construction permits have no statutory limits. Instead Section 319(c) provides, merely that the Commission shall specify the dates for commencing construction, and that the permit "shall provide" that it will be "automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee." (emphasis added) The normal period for completing construction of a television station is specified in Section 3.614 of the Commission's Rules as six months from the date of commencing construction "unless otherwise determined by the Commission upon a proper showing in any particular case." The United Detroit Theatres case, supra, made clear that new parties are not entitled to comparative hearing because the Commission, for good cause shown, has extended the construction permit; in that case the permit had originally been issued on June 11, 1946, and extended, without Ashbacker rights accruing to the appellant, on February 12, 1948.

This does not mean that any party may in its private interest occupy a frequency to the exclusion of other parties for extended periods without making use of it. It does mean, however, that the Commission, where it finds that the public interest would be served by keeping an outstanding permit in effect, and the surrounding circumstances make such conclusion a reasonable one, may permit a construction permit to remain in effect for such

extensions of its original period as may be appropriate. And while these circumstances are not limited to any one situation by the statute or the Commission's Rules, one obvious reason for extending permits is that the failure to get into a position to operate on a regular basis is due, in the language of Section 319(b), to "causes not under the control of the licensee".

In the case of television, and particularly UHF television, the Commission, (as we pointed out in our opening brief (pp. 18-19) and the Commission has stressed in its memorandum opinions in this case (R. 257, 279)), has adopted a conscious policy of affording permittees extended periods of time in which to construct their stations and prepare them for actual operation on a regular basis. This policy is not limited to technical difficulties in the way of early construction of stations, though shortage of high powered UHF transmitting equipment necessary to provide adequate area coverage was one reason for Commission leniency. Instead the Commission, recognizing the overall technical, operational and programming problems of UHF with which this Court is all too familiar (See, e.g., Coastal Bend Television Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686), has as a matter of deliberate policy, periodically extended the construction permits of all UHF permittees, irrespective of the amount of construction (if any) they have done or the date on which the permit was originally granted. Thus the appellant, which received a construction permit for a station in Youngstown on UHF Channel 73 on November 2, 1955, and has never even

commenced construction, still has an outstanding permit, which constitutes the sole basis for its claim of standing here as a "party in interest" entitled to protest. The Commission has adopted this policy in the light of its determination that, by affording UHF permittees an adequate opportunity to work out their very real problems of operation under adverse economic conditions, a larger number will in the long run be able to construct and go into operation on a sound basis than if it had forced immediate construction and operation at the peril of early cancellation of permittee rights. The public, it felt, thus would be the real beneficiary of its policy of leniency.

Viewed in the light of this general policy, applicable according to Commission records to approximately 90 UHF permittees, it is clear that, unless WKST is to be penalized for making a substantially greater effort than most of the other non-operating UHF permittees (including appellant, Community), the Commission's failure to delete its construction permit here is clearly reasonable.[3/] For WKST did not "sit" on its permit when it was originally granted. Instead it constructed a station and

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3/ WKST was not required to seek periodic extensions of its construction permit after February 11, 1954 since Section 3.629(c) of the Commission's Rules expressly provides:

"Unless sooner suspended or revoked, the program test authority continues valid during Commission consideration of the application for license and during this period further extension of the construction permit is not required."

While the operation of WKST under this program test authority was suspended with the approval of the Commission in January, 1955 the WKST license application was not withdrawn but remained pending before the Commission.

placed it into operation on program test authority, only to find that its operation in accordance with its permit at the site originally specified to the east of New Castle was not operationally feasible.[4/] It therefore suspended operation on its program test authority in January, 1955 and was off the air for a period of a little less than two years. Then, having worked out its problems, it filed its application to change its antenna site to one which, while still providing city grade service to New Castle, would permit an economically viable operation for its New Castle station.

Unless, therefore, the position is adopted that construction permits can only remain valid during a period in which a permittee is actively engaged in construction or is prevented from such action by purely technical reasons, a position for which there not only is no statutory authority but which would be equally prejudicial to Community, it is clear that WKST, of all UHF permittees, is perhaps in the best situation. For irrespective of any argument which could be made with respect to permittees which have taken no affirmative action to utilize their authorized facilities, it is clear that there was every reason for the Commission to continue in effect WKST's permit, in view of its real efforts, both past and present, to provide a local service for the people of New Castle.

4/ The record in this case shows that operating from this site WKST was not only unable to secure network programming, but had difficulty securing New Castle listeners since their receiving antennas were oriented to the Youngstown stations to the west which did carry network programs (R. 228).

II. NO PROBLEM UNDER SECTION 307(b) IS PRESENTED BY THE MOVE OF WKST'S ANTENNA SITE

Appellant Community attacks the Commission actions approving the modification of WKST's construction permit to specify a new antenna site near Youngstown on the grounds they are not consonant with the policy of Section 307(b) of the Communications Act. This section requires the Commission to distribute licenses and frequencies among the several States and communities "to provide a fair, efficient, and equitable distribution of radio service to each of the same." Community's position is that "service" within the meaning of Section 307(b) refers solely to "by whom and where a station is heard", that main studio location is irrelevant, and that since WKST, operating under its modified permit, will be "heard" in the entire Youngstown area, it is a Youngstown station.

This is, of course, not the case. It is settled law that "transmission" as well as "reception" are relevant to 307(b) service questions, i.e., that it is important to consider the need of communities for radio and television facilities for local expansion. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358; see Easton Publishing Co. v. Federal Communications Commission, 85 U.S. App. D.C. 33, 175 F.2d 344. It is equally well established that the transmitter location of a television station is not determinative of the principal city a station is actually serving, and that even where, as here, a stronger signal is placed over another city than the one to which the station is assigned, this does not mean that the station ceases to be assigned to the latter community for purposes of Section

307(b). Houston Consolidated Television Co. v. Federal Communications Commission, 99 U.S. App. D.C. 378, 240 F.2d 409; Hall v. Federal Communications Commission, 99 U.S. App. D.C. 86, 91, 237 F.2d 567, 573. As our brief in Case No. 13,872 pointed out (pp. 40-44), all of the relevant information before the Commission, none of which is challenged by Community, indicates WKST will remain a New Castle station. Its principal studios will be in New Castle, its local programming is oriented for New Castle and its owners are New Castle people who own and operate a local New Castle radio station. Community's vague and unsupported innuendos cannot stand up against these facts showing WKST is and will remain a New Castle station.

III. NO SHOWING HAS BEEN MADE THAT THE GRANT TO WKST WAS CONTRARY TO THE PUBLIC INTEREST BECAUSE OF THE ECONOMIC IMPACT ON APPELLANT

Community in its protest specified two issues, which were designated for oral argument (R. 141, 142), relating to the impact of competition from WKST, operating from its new site, upon existing operations. The first of these issues was to determine whether such operation "would adversely affect the operations of UHF stations now operating or authorized to operate at Youngstown or whether the public would be deprived of the service of any such stations." The second was to determine the need of another UHF service at Youngstown and "whether such needs outweighs the prospects of injury to existing or authorized services". The Commission in designating the issues for oral argument expressed

doubts as to whether the protestants' allegation with respect to these issues, if proven, would constitute grounds for setting aside the grant (R. 139). After oral argument the Commission, in its Memorandum Opinion dismissing the protest, found that "neither the Communications Act nor Commission policy would furnish grounds for rescinding the grant to WKST, Inc. on the basis of the facts alleged" (R. 258)

We need not consider here the validity of the Commission's jurisdictional and policy rulings set forth in Southeastern Enterprises, 22 F.C.C. 605, and Voice of Cullman, 6 Pike & Fischer R.R. 164, 14 F.C.C. 770, and cited here by the Commission.[5/] For it is quite clear that in the present case Community has clearly not specified facts which could possibly lead to a conclusion that the grant to WKST was contrary to the public interest because of its possible economic impact upon appellant.

Thus Community does not suggest that the modification of WKST's construction permit will seriously affect the operation of the two operating Youngstown UHF stations (each of which has affiliations with one of the major networks) or that WKST will be unable to operate as it proposes. See Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 476. Instead, it claims solely that it may not be able to get into operation on Channel 73 in competition with the two established

5/ The validity of these holdings is discussed in great detail in a brief filed by the Commission with this Court on December 23, 1957 in Carroll Broadcasting Co. v. Federal Communications Commission, Case No. 14,104.

UHF stations on Channels 21 and 27 if WKST is permitted to operate on Channel 45 from its modified antenna site. This it suggests is not in the public interest because it would inhibit development of the higher UHF channels.

However, to the extent Community's real complaint here is that its Channel 73 cannot compete with lower UHF channels, its complaint is an allocation matter governed by rulings of this Court in Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686, and Van Curler Broadcasting Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 432, 236 F.2d 727. In this respect it is to be noted that Community, in the rule making proceeding in Docket No. 11,766 which resulted in assigning Channel 45 to Youngstown - New Castle in lieu of New Castle only, sought additionally to substitute Channel 33 in Youngstown for Channel 73. This proposal was rejected by the Commission for reasons set forth in the Commission's Report and Order in that proceeding released October 22, 1956. (12 Pike & Fischer, R.R. 1508(i)) Community, however, which had previously argued that a station on Channel 73 could not compete with the two existing stations on lower UHF channels in Youngstown, irrespective of any operation by WKST on Channel 45, never sought review of this order in the courts.

CONCLUSION

For the foregoing reasons, the order of the Federal Communications Commission should be affirmed.

Respectfully submitted,

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December 27, 1957

BRIEF FOR INTERVENOR WKST, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 20 1957
Joseph W. Stewart
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No. 14,241

COMMUNITY TELECASTING COMPANY (WXTV),

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

Intervenor

WKST, INC.,

Intervenor

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

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1. Whether the Commission properly held that Section 307(b) is not in issue since Community's pleadings contained no evidence thereon, and Community did not even mention Section 307(b) in the hearing afforded to it.

2. Whether the Commission properly held that there was no violation of Rule 3.651, and that Rule 3.667 is inapplicable because it applies only to stations which cease operations permanently.

3. Whether the Commission properly refused to consider the alleged economic effects of the WKST modification upon a paper construction permit which Community has held for over two years without ever building its station.

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UNITED STATES COURT OF APPEALS

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Intervenor

WKST, INC.,

Intervenor

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR WKST, INC.

COUNTER STATEMENT OF THE CASE

Intervenor WKST, Inc. (hereinafter referred to as "WKST") hereby incorporates by reference the "Counterstatement of the Case" included in its September 16, 1957 brief in Cases No. 13,872 and 13,873. To that statement only the following need be added:

On September 6, 1957 the Commission released its decision after hearing, denying the Community protest on the ground that the

facts alleged therein, even if proven to be true, would not constitute grounds for setting aside the WKST modification. On October 7, 1957 Community petitioned for reconsideration of this action. Community's petition was denied by Order of November 20, 1957, from which Community appeals. Jet Broadcasting Company, appellant in Case No. 13,873, filed separate additional appeals from the Commission's Orders of September 6, 1957 (Case No. 14,155) and November 20, 1957 (Case No. 14,236).

STATUTES AND RULES INVOLVED

The relevant statutes and rules are set out at Appendix A of WKST's brief filed September 16, 1957 in Cases No. 13,872 and 13,873.

SUMMARY OF ARGUMENT

I

The Commission properly held that there is no Section 307(b) issue involved here, since appellant's pleadings contained no evidence thereon, since appellant failed even to mention Section 307(b) in the hearing given to it, and since the Commission was otherwise aware of no facts indicating that section to be in issue. In any event all Section 307(b) considerations were entertained and disposed of in the Commission's rule-making order of October 17, 1956, from which Community did not appeal.

II

The Commission properly held that there was no violation of Rule 3.651, since WKST temporarily suspended operations with Commission approval. In any event, even assuming, arguendo, that there were a violation, the result would not be automatic forfeiture of the underlying WKST construction permit. Section 312 of the

Communications Act sets out the only way in which permits may be involuntarily revoked or forfeited, even for violation of rules - by formal adjudicatory hearing in which the Commission bears the burden of proof and in which the permittee has notice and opportunity to defend. Finally, the Commission properly held Rule 3.667 to be inapplicable, since that rule relates only to permanent cessation of operations. WKST merely suspended operations temporarily, with Commission approval in accordance with longstanding and uniform Commission policy, pending relocation of transmitter site.

III

The Commission properly refused to consider the alleged economic effects of the WKST modification upon appellant's paper construction permit, under which no construction has ever been completed. Appellant does not have a television station. No UHF/VHF problem is here present. Appellant's sole complaint is against the allocations table, of which it did not seek review. The Communications Act contemplates free competition and does not require the Commission to consider the competitive effects of new stations upon existing paper authorizations. Although economic injury may confer standing as a prerequisite to protest or appeal, it does not confer a substantive right to secure and maintain a monopoly against the entry of others to the field.

ARGUMENT

Introductory

Appellant's brief of December 12, 1957 is in large part repetitive of its earlier brief in Case No. 13,872. Accordingly, the instant argument will be limited solely to the new matters raised by appellant, or to the matters which were untimely raised by appellant in its earlier brief.

I.

SECTION 307(b) OF THE COMMUNICATIONS ACT IS NOT IN ISSUE

The Commission's September 6th Order concluded that although appellant's protest "suggested" the "possibility" of a Section 307(b) question, (1) appellant did not discuss the matter in the oral hearing given to it; (2) appellant's pleadings contained no evidence relating to Section 307(b); and (3) the Commission was otherwise aware of no facts to indicate that Section 307(b) was properly in issue (R. 258). In its petition for reconsideration Community merely responded that "Petitioner has outlined herein several Section 307 problems. Furthermore the effect of granting the WKST application...raises a 307(b) problem." (R. 264). And at Page 10 of its brief herein, appellant makes the same statement.[1] This is no response to the Commission's conclusion and no adequate complaint to this Court.

Appellant has had every opportunity to tell the Commission what its "several Section 307 problems" are. Yet to date it has not done so. Appellant has not cited one page of record to show that it did discuss Section 307(b) in the hearing afforded to it; the record in fact reflects no such discussion.[2] If, as it claims, there was a Section 307(b) question, appellant had ample opportunity to back up that claim in the hearing and in its petition for reconsideration. Having refused that opportunity it cannot now make the same conclusionary and unspecific claims to this Court.

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1 Except for the first paragraph of Argument II, the "Argument" in appellant's brief is merely a verbatim copy of its petition for reconsideration.

2 It should be noted that appellant's instant brief is entirely devoid of any record citations whatsoever.

In any event no Section 307(b) problem exists. All such considerations were entertained and disposed of in the Commission's October 17, 1956 rule-making order. Community did not appeal from that action; it is far too late to do so now. Finally, it is clear that even if there were a Section 307(b) issue as between Youngstown (Community) and New Castle (WKST), Youngstown, with two operating television stations and a construction permit for a third, could not possibly prevail against the needs of New Castle, a city of 48,000 persons, for its first television station, in the absence of proof that the New Castle applicant lacked the basic statutory qualifications. And there is not a scintilla of proof, much less allegation, in this record to show that WKST, Inc. lacks the basic qualifications.

To the extent that appellant's Section 307(b) allegations are meant to imply that by relocating its transmitter site WKST has deprived New Castle of its only station, they are without substance. That main studio location rather than transmitter site location determines station location is too well settled to require further discussion.[3] And appellant's assertion that "service" is measured in terms of contours of power intensity, for Section 307(b) purposes, is disposed of by the uncontroverted fact that the new WKST service contours completely enclose its old contours (R. 200). New Castle will continue to receive its principal city grade signal; all areas previously served by WKST will continue to be served, and substantial areas will receive new and increased service. This Court has already held that a change in transmitter location does not change the station location. Houston Consolidated Television Company v. Federal Communications Commission, 99 U.S. App. D.C. 378, 240 F.2nd 409 (1956).

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[3] This subject is extensively treated in WKST's earlier brief at pp. 19-23.

II.

THE COMMISSION PROPERLY HELD THAT THERE WAS NO VIOLATION OF RULE 3.651 AND THAT RULE 3.667 WAS INAPPLICABLE

Appellant devotes a major share of its brief to an argument that the Commission could not have granted a waiver of Rule 3.651 (Hours of Operation) except on written application therefor. This is in essence a straw-man argument because it miscasts the purport of the Commission's decision. The Commission simply referred to its longstanding and uniform policy of recognizing the generally more difficult financial conditions confronting UHF operators and, in light of such recognition, extending completion dates of UHF construction permits and permitting UHF stations to suspend or curtail their operations beyond the point specified in the Rules, pending reorganizations and other attempts to more effectively utilize their frequencies. This has been done to encourage the development of UHF television and bring an improved nationwide television service to the public. (R. 257). The Commission then referred to the fact that WKST temporarily suspended operations with full Commission approval, and remained silent pending Commission action on a request for further extension of its authority to remain silent. (R. 257). The Commission concluded: "Thus the most that can be said is that if a violation of Section 3.651(a) of our Rules is deemed to have been committed, this has occurred with specific Commission authorization and could not constitute grounds for setting aside the grant protested." (R. 257).

Appellant, however, ignores this context and singles out for attack the Commission's further statement that these circumstances constitute an effective waiver of Rule 3.651, and accordingly no violation is involved, as though that were the only basis for the Commission's decision.

It is clear, however, that the Commission's decision reasonably construed its own Rules. In providing for the encouragement of UHF television throughout the difficult periods of UHF operation to date, the Commission is discharging its duty to facilitate a nationwide television service. In discharging that duty the Commission must be permitted the administrative flexibility necessary to meet the changing dynamics of the art. As the Supreme Court has noted, the whole Communications Act is pregnant with:

> "...recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." (F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138).

This is especially true with respect to UHF television which, as this Court knows, has had an unusually difficult struggle to gain public acceptance and financial stability. The Commission's approach to this problem has been one of patient encouragement, in terms of permitting curtailed or suspended operation pending resolution of operational and financial problems, and in terms of granting multiple extensions of construction permits. Indeed, appellant itself has been the beneficiary of the very policy of which it complains. It has held a construction permit for over two years without ever constructing its proposed station, yet the Commission has repeatedly extended that permit. Significantly, without that policy Community would no longer have a construction permit and would possess no standing whatsoever in this Court. The Commission's approach to the problems of UHF development is in complete accord with the policy of the Communications Act, and cannot be said to exceed its powers. See Federal Broadcasting System, Inc. v. Federal Communications Commission, 225 F.2nd 560, 96 U.S. App. D.C. 260 (1955).

In any event appellant's argument about Rule 3.651 is completely misplaced because it assumes that a purported waiver of that rule constituted a modification of the WKST construction permit for which a formal application was required. This assumption is untenable. A construction permit is not an operational authorization, and therefore need not be modified upon suspension of a station's operations. The question of whether there was or was not a violation of the rule relating to hours of operation is therefore immaterial to the validity of the underlying construction permit. WKST had completed construction under its construction permit; the permit was covered by application for license. Even had there been a violation of the Rules, the Commission could not have revoked that permit without proceeding under Section 312 of the Act. The Act requires an evidentiary hearing in which the Commission bears the burden of proof and in which WKST is entitled to notice and opportunity to be heard.

Finally, the Commission properly held that Rule 3.667 was irrelevant to this proceeding. That rule merely requires that upon "permanent discontinuance of operation" a station shall notify the Commission and turn in its authorization. No fact in this record permits even an inference that WKST intended anything but a temporary suspension of its operation.

Appellant's arguments with respect to Rules 3.651 and 3.667 must be considered in light of the fact that it has been utterly unable to supply this Court with one citation to the record, or with one citation to agency or judicial precedent. Appellant has made many sweeping and serious indictments of the Commission and of WKST. Its inability to support those indictments with record fact or with precedent reflects only upon the good faith and validity of appellant's position. The Commission's longstanding interpretation of Rules 3.651 and 3.667 has been shown to be entirely consistent with its statutory responsibilities and powers. An agency's interpretation of its own

rules should not be disturbed unless that interpretation clearly violates the express command of the statute or the delegated powers of the agency.

III.

THE COMMISSION PROPERLY REFUSED TO CONSIDER THE ALLEGED ECONOMIC EFFECT OF THE WKST MODIFICATION ON APPELLANT'S BARE PAPER CONSTRUCTION PERMIT

In considering this issue two things must be remembered: (1) There is no UHF/VHF competitive problem involved here, since all stations in Youngstown and New Castle are UHF stations and there are no VHF stations in the immediate area; and (2) Appellant does not have a television station but merely a paper construction permit under which it has refused to construct for over two years.[4]

Appellant's paper permit cannot possibly be injured by WKST's operation. In March, 1956, when WKST was not on the air, appellant told the Commission that it could not get network or advertiser commitments for its proposed station, and that operation on Channel 73 would therefore be impossible in competition with the two existing Youngstown stations.[5] In other words, appellant now alleges before this Court that the WKST modification prevents it from securing network and advertiser commitments which it could not get before that modification! Again, at Page 7 of the hearing transcript before the Commission in this very proceeding, appellant conceded that its Channel 73 station was not constructed during the period of WKST-TV's suspended operations because it would have been impossible to compete with the two existing Youngstown stations. In

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[4] On November 13, 1957 Community filed yet another application for a six month extension of its permit (BMPCT-4931).

[5] See WKST Opposition to Motion for Stay, filed May 9, 1957 in Case No. 13,872, at pp. 9-10.

view of these facts, it is submitted that any competitive difficulties to be faced by Community would not be the result of the WKST modification. Clearly appellant cannot rely on a bare paper permit to establish separate competitive injury from WKST especially where, as a preliminary matter, the Court would have to engage in serious speculation as to whether appellant's station will in fact ever be built.

For these reasons it is suggested that to the extent that appellant's brief consistently refers to its paper permit as "Station WXTV" or "WXTV's operation," it must be viewed with a degree of caution. This also applies to appellant's statements concerning "the survival of WXTV" and Youngstown's loss of "the service of its only independent station." (See Argument IV of appellant's brief in Case No. 13,872).

Arriving at the merits, the Commission's refusal to consider appellant's economic arguments was clearly proper. Rather than discussing the reasons or precedents set out in the Commission's Order, appellant merely stated that "The public interest is not served when the Commission permits its licensing policy to interfere with development of the higher UHF channels through lower channel [UHF] competition" (Appellant's December 12, 1957 brief, Argument V). But this is merely a complaint against the 1952 allocations table, of which appellant did not seek review. This Court has already declared that it will not interdict Commission license proceedings which are consistent with existing and valid television allocations, despite existing stations' claims that such licensing actions will cause them economic injury. Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2nd 686 (1956). Here the WKST modification was consistent with the existing and unchallenged television allocations table, and with all Commission rules for the operation of Channel 45 at New Castle. Not having challenged the assignment table, appellant cannot now attack a consistent licensing proceeding on the ground that economic injury might result.

This was not a new assignment previously unknown to appellant. Appellant secured its Youngstown Channel 73 permit with the knowledge that Channel 45 was assigned to New Castle, and that under existing Commission Rules WKST as a New Castle station could locate its transmitter at any point which would still provide the City of New Castle with the required city grade signal. And even if appellant had been unaware that a WKST transmitter move was possible under the existing rules, it would still have no complaint. See Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F.2nd 727 (1956).

Finally, it is clear that the Commission was correct in stating that "Neither the Communications Act of 1934, as amended, nor Commission policy would furnish grounds for rescinding the grant to WKST, Inc. on the basis of the facts alleged." (R. 258). In the first place, appellant alleged no facts, either in its protest or in the oral hearing itself, to show that the public interest would suffer from competition between WKST and appellant's proposed "station." Indeed, such facts as were alleged indicated only that petitioner's station would never be built, regardless of whether WKST resumed operations. Although appellant, at Page 12 of its brief in Case No. 13,872, claims that the "eventuality" of its station not being able to survive would deprive Youngstown of "its only independent station," appellant has just as clearly indicated that it will never construct if it has to operate as an independent station (Ibid.). Therefore there cannot possibly be an "independent station" whose service can be taken away from the community. Appellant's express complaint is that WKST will garner the last remaining network affiliation (ABC). It is submitted that the question of whether WKST or Community gets the ABC affiliation is not a matter affecting the public interest, so long as one of the two gets it and provides the programming to the public.

It is well settled that the Communications Act of 1934, as amended, does not confer a private monopoly right upon permittees and licensees. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1942). It does not offer immunity from competition; to the contrary, it expresses a policy of free competition in broadcasting. Idem. In the Sanders case the Supreme Court stated that Congress in the Act had not "abandoned the principle of free competition," that "the broadcasting field is open to anyone," and that the policy of the Act was clearly that "no person is to have anything in the nature of a property right as a result of the granting of a license. * * * Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. * * * If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives." 309 U.S. 470, 474-476.

As supplemented by the later Scripps-Howard decision, supra, Sanders clearly stands for the proposition that although economic injury may render an existing station a "person aggrieved," and therefore confer standing to appeal under Section 402 of the Act, such economic injury is not a substantive basis for relief. With respect to this point, the Supreme Court had this to say in the Scripps-Howard decision:

> "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By Sec. 402(b) (2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. * * * But these private litigants have standing only as representatives of the public interest * * * the rights to be vindicated are those of the public and not of the private litigants." (316 U.S. 4, 14-15, citing Sanders Bros.)

In a similar case involving the Bituminous Coal Act of 1937, the later Judge Frank comprehensively discusses the body of case law devoted to the question of standing. Associated Industries v. Ickes, 134 F.2nd 694 (2 Cir., 1943). The Bituminous Coal Act (15 U.S.C.A. Sec. 828 et seq.) contained an appeal provision similar to Section 402(b) of the Communications Act, and Judge Frank therefore looked to the Sanders and Scripps-Howard decisions as landmarks. Following a long discussion of background history, and an analysis of the decisions themselves, he stated:

> "The court, in the Sanders and Scripps-Howard cases, as we understand them, construed the 'person aggrieved' review provision as a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. Although one threatened with financial loss through increased competition resulting from unlawful action of an official cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the 'person aggrieved' statute gives the needed authority to do so to one who comes within that description.

> "The Supreme Court has explicitly told us that one threatened with financial loss through increased competition resulting from a Commission's Order is 'aggrieved' and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review is designed to keep competition alive and confers upon him no property right which gives him any kind of immunity from competition." (134 F.2nd 694, 705).

And this Court, in National Coal Ass'n. v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F.2nd 462 (1951), has stated its agreement with the rationale which Judge Frank drew from the

Sanders and Scripps-Howard cases in Associated Industries v. Ickes. The National Coal Ass'n case also dealt with a statutory review providing similar to Section 402 of the Communications Act. Following the reasoning of the Supreme Court and of Judge Frank, this Court held the petitioner to have standing to appeal the grant of a certificate of necessity for construction of a gas pipeline which would compete with petitioner's coal association members. But with respect to the question of whether such competition could be considered as a substantive matter, this Court stated:

> "Coming now to the merits, petitioners say that before the Commission can grant a certificate of necessity, it must consider as separate and independent elements (1) the effect of issuance of the certificate upon competing fuels and transportation and related labor interests, and (2) the relation of the project to conservation of natural gas. Although considerations such as those suggested by petitioners may well be part of the complex out of which the Commission's judgment as to 'public interest, convenience and necessity' arises, they are nowhere made standards governing the issuance or denial of certificates. Even if the Act be construed to confer a right upon competing fuels and transportation to participate in Commission proceedings and to vindicate the public interest on review, it does not follow that the interests of such groups in retention of markets may bar issuance of a certificate found to satisfy the explicit criteria furnished by Sec. 7(e) of the Act." (191 F.2nd 462, 467).

Similarly, competition with existing stations is nowhere made a standard in the Communications Act for the issuance or denial of broadcast licenses. As stated in Sanders, "The Act contains no express command that in passing upon an application the Commission must consider the effect of competition with an existing station." 309 U.S. 470, 473. The WKST application was found to comply with all existing requirements of the Act and the Commission's Rules. Accordingly, and to paraphrase the above language of this Court, even if the Act be

construed to confer a right upon a competing station to protest the grant under Section 309(c) and to seek review under Section 402(b) by way of vindicating the public interest, it does not follow that the interests of such station in the retention of its market may bar the grant of a license found to satisfy the explicit criteria of the Communications Act and the Commission's Rules.

For these reasons it is submitted that the Commission's refusal to consider appellant's substantive economic allegations was reasonable and proper, especially in view of the non-specific and inconsistent nature of such allegations. Because of such nature, any injury to appellant would necessarily be speculative and conjectural at best. But even assuming that there might possibly be injury, however indirect and speculative, it would clearly be damnum absque injuria. Accordingly, the Commission's conclusion was correct both as a matter of law and policy.

CONCLUSION

For the foregoing reasons, the Commission actions complained of by appellant should be upheld by this Court.

Respectfully submitted,

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